In forma pauperis
Petition not printed

IN THE

Supreme Court of the United States

OCTOBER TERM, 1942

NO. 704

ROBERT REDUS, ALIAS ROBERT REEDUS,
Petitioner,

v.

STATE OF ALABAMA,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

BRIEF FOR RESPONDENT

WILLIAM N. McQUEEN,
Acting Attorney General
Counsel for Respondent.

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I.

OPINION OF THE COURT BELOW

The opinion of the Supreme Court of Alabama, which is here under consideration, is reported as follows: Redus v. State, 9 So. (2d) 914 (R. 111-122).

II.

JURISDICTION

Petitioner seeks to invoke the jurisdiction of this court to review the judgment of the Supreme Court of Alabama rendered on June 18, 1942, rehearing denied October 8, 1942. Petitioner relies upon Section 237(b) of the United States Judicial Code, as amended on February 13, 1935, 43 Stat. 937 (U. S. C. A., Title 28, Sec. 344), as giving this court jurisdiction.

POINTS RELIED UPON BY PETITIONER

The points relied upon herein by petitioner as grounds for relief, in the order set forth in his brief, are as follows:

1. That the trial was had in violation of the Equal Protection clause of the Fourteenth Amendment to the Constitution of the United States in that negroes were intentionally and systematically excluded from the grand and petit juries because of race and color in Limestone County, Alabama, where the trial was held.

(a) That the trial court erred in concluding that the alleged exclusion of negroes from the grand and petit jury of Limestone County could not be set up for the first time in a motion for a new trial.

2. That Petitioner was deprived of a fair, impartial and deliberate trial as guaranteed to him by the First and Fourteenth Amendments to the Constitution of the United States in that the petit jury in writing its verdict finding petitioner guilty of murder in the first degree and fixing punishment at death by electrocution wrote the said verdict with a red pencil.

3. That the Supreme Court of Alabama erred in finding and holding, in effect, that petitioner was not denied a fair, impartial and deliberate trial of his case in the Circuit Court of Limestone County, Alabama, contrary to the First and Fourteenth Amendments of the Constitution of the Unied States, in holding that it was a proper examination of the venire on the voir dire by the Solicitor, prosecuting for the State, to ask the jurors the following questions:

"Gentlemen, do you have any moral or religious scruples against capital punishment? Do you believe the Bible in any of its parts, taught that capital punishment was contrary to the Bible?— I will ask you if you think the Bible in any of its phases teaches that it is against the Bible, that capital punishment is against the teachings of the Bible?— Do you believe,—when I say 'capital punishment' I mean punishment by death,—do you believe that capital punishment, or punishment by death, is contrary to the teachings of the Bible in any way?— Do you believe that the death penalty

administered by a court of justice is contrary to the teachings of the Bible?"

4. That the Supreme Court of Alabama erred in finding and holding, in effect, that the conviction of petitioner for the crime of murder based upon an alleged confession of guilt extorted by and through coercion, compulsion and by putting petitioner in fear, by State officers, is not a denial of due process of law to petitioner guaranteed to him by the Fourteenth Amendment to the Constitution of the United States.

5. That the Supreme Court of Alabama erred in finding and holding, in effect, that petitioner's rights, guaranteed to him by the First and Fourteenth Amendments, and by Article Sixth, of the Constitution of the United States, may be waived by petitioner, or by his attorney, and that petitioner did waive his constitutional rights by failing to claim or assert them on the trial of the case on its merits, and by raising them for the first time on the hearing of the motion for a new trial, after petitioner had been tried, convicted and sentenced to death.

III.

STATEMENT OF THE CASE

Robert Redus, alias Robert Reedus, petitioner, was indicted by a Grand Jury of Limestone County, Alabama, for the offense of murder in the first degree. The indictment charged that petitioner unlawfully and with malice aforethought killed Bedford Brackeen by shooting him with a gun or pistol against the peace and dignity of the State of Alabama and was returned and filed in open court by said Grand Jury on March 25, 1941, (R. 5).

On May 19, 1941, the petitioner and counsel of his own choosing appeared before a judge of the Circuit Court of Limestone County, Alabama; and being duly arraigned upon such indictment interposed two pleas (1) not guilty, and (2) not guilty by reason of insanity. The court thereupon fixed June 23, 1941, as the day for the trial of the case (R. 25).

When the trial was reached, counsel for petitioner interposed no objections to going to trial on the indictment which had been returned by the grand jury on March 25, 1941, nor was any objection interposed to the composition of the petit jury before whom the case was to be tried. No ruling of the court was sought to be invoked on the proposition that the petitioner was denied rights guaranteed to him by the Fourteenth Amendment to the Constitution because members of his race had been intentionally, system-

atically and arbitrarily excluded from the jury rolls and jury boxes of Limestone County, Alabama, from which rolls and boxes the grand jury which had indicted petitioner and the petit jury which was to try petitioner had been drawn. The trial was entered upon on the day set therefor with defense counsel in attendance, but without objection or exception and without motion for continuance or motion for postponement. (R. 27).

The jury, upon hearing the case, returned a verdict of guilty on the 25th day of June, 1941, and the judgment was entered and sentence pronounced on the same day. (R. 25, 26).

On the 23rd day of July, 1941, petitioner filed a motion for a new trial, cataloguing ten grounds, seeking to have the verdict of the jury set aside. The following grounds of his motion were strenuously insisted upon, to-wit:

1. That one of the jurors was disqualified in that he was closely related to a member of the city council that employed deceased as a policeman for the city of Athens, Limestone County, Alabama, and was made foreman of the jury which returned its verdict written with a red pencil.

2. That K. M. Biles, a deputy sheriff ,was bailiff of the jury and was a state witness against the defendant and was greatly biased and prejudiced against the petitioner.

3. That the verdict of the jury was not a unanimous verdict.

4. That the verdict rendered in the case was not based upon the law and the evidence, but was dominated by public opinion and public sentiment.

5. That members of the colored race were systematically excluded from the petit jury drawn to try this petitioner.

SUMMARY OF STATE'S EVIDENCE IN THE TRIAL COURT

In the early morning hours of March 23, 1941, (Sunday morning around two o'clock A. M.), Bedford Brackeen was shot on a public street in the city of Athens, Limestone County, Alabama (R. 32). He was removed to a local hospital where he died the next day. He was shot three times, once in the left shoulder, once in the chin, and once in the ring finger of his left hand. (R. 31). He was a night policeman for the city of Athens and on duty at the time he was shot. A brother officer (J. Will Johnson) was on duty at the same time and was present at the time deceased was shot. (R. 32). The corpus delicti was proven by State witnesses Powers (R. 31) and Johnson (R. 32). State witness J. Will Johnson and the deceased drove the officers' car down a public street in the city of Athens and parked the car about twelve or fifteen feet from a parked car on which

the headlights were burning. Johnson was driving the police car and as he parked the car he saw this petitioner standing in the street talking to another negro named Nick Townsend. He heard Townsend say to petitioner, "Here is the night police, you want to see him?" Petitioner approached the right hand side of the police car. Deceased was sitting in the front seat of the car and on the right side thereof. Petitioner stated that he wanted to see Mr. Johnson and deceased said "Here he is". (R. 33). Petitioner asked Johnson "Why did you attempt to slap my sister?" (R. 33). Johnson replied that he didn't do it. Petitioner replied, "My sister says you attempted to slap her". (R. 33). Johnson stated that it was a lie and a damn lie. Petitioner then stepped back with his hand in his pocket and said "you can't call my sister no lie" (R. 33). That Johnson got out of the car on the left hand side and as he did this petitioner jerked his pistol out of his right hand pocket and shot at Johnson. Johnson then shot at petitioner and petitioner then ran behind petitioner's car and Johnson shot at him three times when petitioner ducked his head from behind his car. (R. 33, 39). At this point the deceased got out of the police car and came to the side of Johnson and opened fire on petitioner. (R. 33).

The light from the hotel near the scene of the shooting was shining in Johnson's face and he ran to the corner of the bus station across the street. Petitioner shot at Johnson as he ran to the corner of said bus station. Johnson attempted to return the fire when

his gun snapped on empty cartridges. While Johnson was reloading petitioner and deceased were shooting at each other (R. 33). Petitioner pulled his gun and fired the first shot (R. 35) and according to Johnson petitioner shot six times (R. 35). Johnson was shooting a .22 Woodsman Automatic and the deceased was shooting a .22 High Standard Automatic (R. 34). Petitioner was shooting a larger caliber pistol than a .22 (R. 34). After the firing ceased Bedford Brackeen said to Johnson, "Bill, I am shot". (R. 34). Petitioner then ran west up Washington Street toward the railroad (R. 34).

Petitioner was arrested in Nashville, Tennessee, on March 25, 1941, two days after he fled the scene of the shooting. (R. 50). The Sheriff of Limestone County, Alabama, while bringing petitioner back from Nashville, Tennessee, asked petitioner where his pistol was. Petitioner replied that he threw that gun away just before he got to Nashville, and that he could not take the sheriff to the place where he threw it to save his life; that the train was running fast. (R. 78).

Mr. K. M. Biles, Chief Deputy Sheriff of Limestone County, Alabama, testified that he was with the sheriff when the petitioner was brought back from Nashville, and that he had a conversation with petitioner in Columbia, Tennessee, en route to Alabama, where they stopped for a few minutes at a filling station, in which the petitioner made a statement concerning the homicide. Mr. Biles testified

that the statement was in all respects voluntary and that neither he nor anyone in his hearing or presence abused petitioner, or offered him any inducement, or held out any reward, or threatened him in any way, to get him to make a statement; (R. 79) that petitioner stated that he hated it about Mr. Brackeen. Mr. Biles said, "We all hate it, but we all make mistakes sometimes," to which petitioner replied, "I just lost my temper and that was the cause of the whole thing." (R. 79, 80). The Sheriff, Martin Whitt, further testified that "We didn't handcuff him (petitioner) when we came back (from Nashville). I never did handcuff him." (R. 80).

The body of the deceased, Bedford Brackeen, was exhumed on May 13, 1941, and a post mortem examination conducted by Dr. C. J. Rehling, Director of Laboratories for the State Toxicologist, (R. 41). Dr. Rehling testified that he found where some bullets had entered the body. He further testified that the body showed evidence of a wound in the left upper arm and no exit wound in that area; that there was another entrance wound in the left center of the chin and an exit wound about the middle line under the neck, followed by another entrance wound just to the right of the center line of the body. He stated that with the head in a bowed position these three wounds were directly in line. (R. 41). He further testified:

"On autopsying the body I recovered a pitsol ball from this arm, down in the flesh here, and determined the internal course of this missile. The

other bullet entered about here (indicating) struck the bone and stopped in the muscle of the arm. I took the ball out. I traced the other one. After it entered here (indicating) it had a downward and curving course, going behind the right collar bone, passing between the gullet and spine and downward and was spent; it did not penetrate this wall; it made a very small injury when it struck this wall; in this passage it penetrated the front lobe of the left lung. In the manner of that wound from the line of that wound here (indicating), that lung was collapsed; it contained much injury blood clot as large as my hand and I recovered a pistol ball from the lower pleural cavity. It was a jacketclad bullet. I examined those bullets. I took them to Auburn and conducted a laboratory study of them. I made measurements and photographic examinations of the bullets. They were .32 caliber. Both .32 caliber. I made a ballistic comparison of those two bullets. That is one of the photographs. The lines on those two bullets are patterns. Those lines are made by the inner walls of the pistol. *** 'This examination, to examine the pattern that was transferred to each of these bullets, they are mounted on what is known as a ballistic microscopic instrument, designed for such examination in which we can view portions of both bullets at the same time by mounting them on there, and putting them in juxtaposition, we can examine the minute particles and markings of the barrels; these patterns are markings for each gun; it is projected in that gun when it is made

and is characteristic of that gun only, and that gun will transfer that pattern to that ball when it is fired, and by determining whether the patterns are alike or different, you can tell whether they are fired from the same gun. That is what I did here and after I obtained these 2 views here, I photographed them and these are the two views. These are photographs of the two bullets. I made them.' *** (Q) Doctor from those examinations that you have stated that you made and tests that you give, is it your opinion, would you state, that these two bullets were fired from the same gun. TheThe defendant objected to the question the Court overruled the objection and the defendant duly excepted. Wit. ans. They were fired from the same gun. *** " (R. 41, 42, 43).

Buster Black, a witness for the State, testified that he worked at the bus station near the place where the shooting occurred and was working at the station at the time of the shooting. He testified he saw the shooting and saw deceased get out of the police car and work his way across the street to the front of petitioner's car. He stated that he saw petitioner shooting at the deceased, that deceased was squatting down in front of petitioner's car and petitioner was shooting at him. That Johnson (the other policeman) was under the bus station reloading his gun at the time deceased was squatting down in front of the car and petitioner was shooting at deceased in his squatting position. He further testified the petitioner shot at the deceased twice while

he was squatting down and then petitioner ran toward the railroad (R. 45). He stated he did not know how many shots were fired, but in his judgment there were 15 or 16 shots, and that he saw petitioner fire about six shots, and did not see him loading at any time. That he knew petitioner shot about six times without reloading and from the sound of petitioner's pistol he thought it was a .32 caliber pistol. (R. 45). He further testified that he was standing about five or six feet from Johnson while he was reloading his pistol and that while Johnson was reloading petitioner and deceased were exchanging fire. That he saw Mr. Brackeen flinch when he was shot and that petitioner was shooting at deceased at the time he flinched (R. 46).

Buford Romie testified as a witness for the State and stated that he saw the last of the shooting. He further testified that he saw deceased squatting down in front of petitioner's car and that petitioner was shooting at deceased in such squatting position (R. 47).

C. A. Newby, a witness for the State, testified that he saw the shooting and saw petitioner shooting at the deceased while deceased was in a squatting position in front of petitioner's car (R. 47, 48).

All of the State's witnesses who testified as to the confession made by the petitioner positively stated that the confession was voluntarily made and that

petitioner was not mistreated, threatened, intimidated, or coerced in any manner.

SUMMARY OF PETITIONER'S TESTIMONY IN THE TRIAL COURT

The petitioner, Robert Redus, alias Robert Reedus testified in substance that he walked up to the officer's car on the side Mr. Brackeen was on and asked Mr. Johnson if he went out to petitioner's home the evening before and also what his business was in going out there, and also what he said to petitioner's sister. He stated he had his foot on the running board and had a habit of putting his hand in his pocket. That Johnson asked petitioner what did his sister say he said, and that petitioner said, "My wife said you came up there with a man to claim a bicycle and my sister said they didn't have no right to give it up and she tried to reason with Mr. Johnson and he got mad and told her he would slap her face off." (R. 69). He testified that Mr. Johnson then said that is a "God-damn lie," and got out of the car on the left hand side. That when he got out of the car petitioner stepped back a little and Johnson called him a black son-of-a-bitch and opened fire. That petitioner said nothing and then Johnson fired and the bullet struck petitioner in his left wrist and that as he turned to the right Mr. Johnson fired again and the second bullet hit him in the left arm (R. 69). He further testified that up until then he had not pulled his gun but was trying to get out of the way. That he started running toward the front of his car and

that Johnson was still shooting at him. That he saw that there was nothing left to do but protect himself and he started shooting from behind his car (R. 69). He testified he fired a few shots but didn't know how many, that he fired back so that he could have a chance to get away (R. 69). Petitioner testified that he did not shoot six times; that his gun only carried five cartridges and that he had one left and that he extracted the empty shells sometime later. He stated that he did not see Mr. Brackeen during the shooting and that he did not shoot at him (R. 70). That he left and went south down the railroad to a colored doctor and got his arm dressed. He further testified that when he left the doctor's office he was excited and in pain and knew his parents were not at home and that he knew he had some explaining to do (R. 70). He testified that he spent the night out west of town and caught the train (freight) to Nashville on Monday night (R. 70). A pistol was exhibited in court to the petitioner while he was on the witness stand and he testified that it was his pistol and was an Iver-Johnson revolver, commonly called an "Owl Head", and shoots a .32 short (R. 70). That a .32 long would not fit it. It was the pistol which he threw away three or four miles from the city of Athens, Alabama, while he was on the freight train going to Nashville, and the one which his father found and brought to court (R. 70). He denied shooting at the deceased at any time, and didn't see deceased do any shooting (R. 71). He further testified that he left his barber shop sometime after two A. M. on Sunday morning and rode home in a borrowed automo-

bile and put his pistol in his pocket as he started home. That it was sometime after two A. M. when he arrived home and his wife immediately told him about Mr. Johnson coming out there and all that was said and done with reference to the bicycle (R. 71). That Mr. Johnson was doing most of the smart talking and that he went to see him and settle the matter and that two A. M. o'clock was not too late to straighten out the matter (R. 71).

Lily May Hinds, a witness for petitioner, testified that she lived in the same house with petitioner and was living there at the time Mr. Johnson, policeman for the City of Athens, came out to the house for a bicycle (R. 53). That she was at the house at the time petitioner came from work at about 2:30 A. M. and she told him that Mr. Johnson threatened to slap her damn face (R. 54).

Esther Redus, wife of petitioner, testified that when petitioner came home from work on the Sunday morning that deceased was shot she told him what had transpired with reference to the bicycle and officer Johnson's trip to petitioner's house. That after she told him about the difficulty he walked the floor, rubbed his face and head, wiped his hands over his face, and stared into space, and cried (R. 59). That he left the house and never came back (R. 60).

Henry Redus, father of petitioner, testified that petitioner told him where he threw the pistol after the shooting and that he made three trips before he

found it and turned it over to petitioner's lawyer (R. 61, 62).

Some twelve or more respectable citizens of Athens and Limestone County, including the Sheriff who arrested petitioner and returned him from Tennessee, appeared and testified as to petitioner's good character (R. 50, 55, 56, 57, 58, 59). Petitioner offered showings for four character witnesses which showings were duly admitted in evidence by the trial court (R. 63, 63-A, 63-B).

There were a few conflicts in the testimony. The Sheriff testified that petitioner told him that he threw his gun from a fast moving freight train just before he got to Nashville, Tennessee, and could not take the Sheriff to the place where he threw it (Record 78). Petitioner testified that he threw the gun away three or four miles from Athens, Alabama, while he was riding the freight train (Record 70).

State witness Johnson testified that petitioner fired the first shot and brought on the difficulty (Record 35). Petitioner testified that he did not shoot until after he was shot by Johnson and that Johnson was the aggressor (Record 69).

State witness Biles testified that Petitioner, on the trip from Tennessee, said he hated that about Mr. Brackeen, and that "I just lost my head and that was the cause of the whole thing." (Record 80). Petitioner admitted having a conversation with Johnson enroute to Alabama from Tennessee but denied

that he stated "I just lost my head, and that was the cause of the whole thing." (Record 80).

There is no doubt in our mind that the Iver-Johnson gun alleged to have been used by petitioner and produced during the trial of this cause was a "planted gun". We think petitioner told the truth when he stated to the Sheriff of Limestone County, Alabama, that he threw the gun from the fast moving freight train just before he got to Nashville, Tennessee, on his flight.

These conflicts made and presented a jury question and the case was properly submitted to the jury for their determination.

ARGUMENT

THE SUPREME COURT OF ALABAMA DID NOT ATTEMPT TO DECIDE THE FEDERAL QUESTION WHICH PETITIONER SOUGHT TO PRESENT, BUT FAIRLY AND SUBSTANTIALLY, AND WITHOUT ATTEMPT AT EVASION, BASED ITS OPINION ON A NON-FEDERAL GROUND

Respondent construes the petition for the writ of certiorari filed in this cause and brief filed by counsel for petitioner to take the position that the judgment of the Supreme Court of Alabama should be reversed because of the fact that the Supreme Court of Alabama erred in holding, in effect, that petitioner had been denied equal protection of the law in that members of his race—the negro race—had been systematically and arbitrarily excluded from the jury rolls and jury boxes from which the grand jury which found the indictment against petitioner was drawn and from which the petit jury which convicted petitioner was drawn.

Respondent is familiar with the long line of cases cited by petitioner holding that whenever by any action of a State, whether through its Legislature, through its courts, or through its executive or administrative officers, all persons of the African race are excluded, solely because of their race or color, from serving as jurors in the criminal prosecution of a person of the African race, the equal protection laws is denied to him, contrary to the Fourteenth Amendment to the Constitution of the United States.

Smith v. Texas, 311 U. S. 128, 85 L. Ed. 106;

Pierre v. Louisiana, 306 U. S. 354, 83 L. Ed. 737;

Martin v. Texas, 200 U. S. 316, 50 L. Ed. 497;

Carter v. Texas, 177 U. S. 442, 44 L. Ed. 839;

Ex Parte Virginia, 100 U. S. 339, 25 L. Ed. 676;

Hill v. Texas, (Adv. Opinions) 86 L. Ed. 1090.

We respectfully submit, however, that in each of the cases just above cited, the defendant raised the point in accordance with the established practice or procedure of the state in which the trial was had.

Here, however, petitioner, admits that this question was not raised nor was any attempt made to raise the question until after a verdict of guilty had been returned by the jury and the judgment and sentence of the Court pronounced thereon. It is uncontroverted that this question was first presented on the motion for a new trial. Petitioner contends that the point, although made for the first time on the motion for a new trial, was timely and seasonably made. He contends that constitutional rights cannot be waived and that a conclusion that such a point could not be raised for the first time on a motion for a new trial would be tantamount to holding that such a right could be waived.

Respondent contends that it is not necessary to go into the question as to whether or not a constitutional right may be waived, but in view of the fact that petitioner has dwelt on this point at such great length, we call to the Court's attention the recent case of *Johnson v. Zerbst*, 304 U. S. 458, wherein it is held specifically that a constitutional right may be waived, in that case the right to counsel. To a like effect is the decision in the case of *Patton v. United States*, 281 U. S. 76, wherein it is held that the constitutional right of one on trial for crime to a jury of twelve persons may be waived.

We submit that his failure to interpose a timely motion to quash or a plea in abatement does not involve the question of a waiver of the right to equal protection of the laws, but is a failure to comply with the law of the State of Alabama as to the method of presenting to the trial court for its consideration the question as to whether or not that right had been denied.

An examination of the opinion of the Supreme Court of Alabama in this case (Record 111-122) will immediately reveal that the Court did not pass on the federal question of whether the petitioner had been deprived of any right guaranteed him by the Federal Constitution because of the alleged exclusion of negroes from the grand jury, but on the contrary, rested its conclusion on the established practice of Alabama, which it concluded had been correctly fol-

lowed by the trial court. The Supreme Court of Alabama simply held that:

> "No question is presented for review as touching the organization of the court, the arraignment of the defendant, the setting down of his case for trial, nor as to the venire or selection of the jury by which appellant was tried." (Record 111-122).

A determination of this question must, of course, lead to an examination of the applicable rules of the State practice concerning the matter of raising such questions. According to the decisions of the Supreme Court of Alabama, the proper manner of raising the Federal question of the systematic exclusion of negroes from the grand jury where the defendant is of the negro race is by a plea in abatement or motion to quash the indictment. *Millhouse v. State*, 232 Ala. 567, 569, 168 So. 665; *Vaughn v. State*, 235 Ala. 80, 81, 177 So. 553, *Norris v. Alabama*, 294 U. S. 587, 590.

It is also well settled that where a defendant pleads to the merits without interposing a formal plea in abatement or motion to quash the indictment and proceeds to trial, he cannot be heard, upon motion for new trial, to complain of any defects in the grand jury or its composition.

Simpson v. Golden, 114 Ala. 336, 21 So. 990;

Fulwider v. Jacobs, 221 Ala. 124, 127 So. 818;

Moorer v. State, 115 Ala. 119, 22 So. 592;

Higdon v. State, 20 Ala. App. 649, 104 So. 913;

Walker v. State, 19 Ala. App. 20, 95 So. 205;

Wadsworth v. State, 18 Ala. App. 352, 92 So. 245.

In the Wadsworth case, for instance, the Court of Appeals of Alabama remarks:

> "Having the opportunity to raise this question (the validity of the grand jury that found and returned the indictment) on the main trial, and it appearing not to have been presented, the defendant cannot ask that it be reviewed, when first presented in his motion for a new trial."

Again, in *Hornsby v. State*, 94 Ala. 55, the court, while concluding that the indictment was improperly drawn, stated:

> "We are of the opinion that the particular defect complained of (an insufficient averment) is not available on motion in arrest of judgment; but to be available, advantage must be taken of the defect before trial and conviction."

The court pointed out the danger of following any other rule, stating:

> "Under any other rule, no attorney of skill would interpose a demurrer or other objection when an indictment was defective. He would simply take the chance of acquittal, and failing in this, would move in arrest of judgment and thereby secure a discharge of defendant or a new trial."

The same conclusions are equally applicable in the instant case, for if this Court were to hold that the petitioner in this case had been denied due process of law, even though he delayed raising the point until after the verdict of the jury, it would be tantamount to nullifying the rules of procedure which the State of Alabama has interposed to prevent just such a gamble.

The Supreme Court of Alabama did not pass on the procedural question for the first time in this case. The rule had theretofore been laid down that where a defendant made no objection to the personnel of the jury on account of race or color until on motion for a new trial, that such objection came too late. In the case of *Powell v. State*, 224 Ala. 540, 550, 141 So. 201, the Supreme Court of Alabama considered the identical question and said as follows:

> "It is also insisted, however, for the first time on motion for new trial, that 'exclusion of negroes

from the list of jurors,' from which defendants' jury was drawn, was a denial of the defendants' rights under the Constitution of the United States, Amendment 14, Sec. 1. It should suffice to say that the defendants made no objection whatever to the venire upon any such ground, nor does the record, in point of fact, sustain any such contention. Having made no objection to the personnel of the jury on account of race or color, the defendants are in no position to put the court in error, in the contention made for the first time on motion for new trial. By failing to object to the personnel of the jury, the defendant must be held to have waived all objections thereto. Batson v. State, 216 Ala. 275, 113 So. 300; Herndon v. State, 2 Ala. App. 118, 56 So. 85; Carson v. Pointer, 11 Ala. App. 462, 66 So. 910; 20 R. C. L. 241; 18 L. R. A. 475, Note; 68 L. R. A. 885; Note; 16 Corpus Juris. 1156; Eastman v. Wight, 4 Ohio St. 156; State v. Jones, 89 S. C. 41, 71 S. E. 291, Ann. Cas. 1912 D, 1298; Ryan v. Riverside, 15 R. I. 436; 8 A. 246; Stewart v. Ewbank, 3 Iowa, 191; State v. Whiteside, 49 La. Ann. 352, 21 So. 540; Ferrell v. State, 45 Fla. 26, 34 So. 220; Whitehead v. State, 206 Ala. 288, 90 So. 351."

To like effect is the decision of the Supreme Court of Alabama in the case of *Clark v. State*, 195 So. 260. In the case of *Peterson v. State*, 277 Ala. 361, 150 So. 156, it was held that an objection going to the venire of the petit jury or any member thereof must be made before entering upon the trial of the case on its

merits, on the defendant's plea of not guilty, and a failure to make such objection constitutes a waiver. The courts of Alabama have consistently held that it is not permissible for a defendant who has not been misled by the false oath and fraud of a juryman to participate in the selection of a jury without objection, thereby speculating on winning a favorable verdict, and failing to do so, allow him to raise such question on a motion for a new trial. *Simpson v. Golden*, 114 Ala. 336, 21 So. 990.

It certainly cannot be successfully contended that petitioner could not have raised the question before entering his plea of guilty on the ground that prior to that time he had no way of knowing whether or not members of his race were on the petit jury before whom he was to be tried. The constitutional guaranty is not that a negro is entitled to have a member of his race on the grand jury which returned the indictment or on the petit jury which tries him, but is that he is entitled to have members of his race who are otherwise qualified to be on the jury rolls and in the jury boxes from which such juries are drawn.

Counsel for petitioner, in his brief, makes the broad assertion that members of the Negro race were excluded from grand and petit jury service at the time of the return of the indictment against petitioner for the alleged murder of Bedford Brackeen, and have always been excluded from grand jury service and petit jury service in Limestone County, Alabama, both intentionally and systematically, solely

on account of race and color, notwithstanding the fact that two members of petitioner's race were on the venire of the petit jury drawn to try him.

We respectfully submit that the broad assertion above is not based upon any facts and is not fortified by one line of testimony. The statement is untrue, unfair, and without foundation of fact. Certain it is that the trial court of a sovereign state should be given the opportuinty of passing on such a question in accordance with the law and the practice of that particular state, subject, of course to review by this court.

We call to the Court's attention the case of *Millhouse v. State*, 232 Ala. 567, 168 So. 665, wherein the Supreme Court of Alabama specifically holds that a motion to quash an indictment on the ground that the defendant is of the negro race, and in the selecction of the grand jury which found the indictment, members of his race were systematically excluded because of race, presented good ground to quash the indictment. The Supreme Court of Alabama reversed the trial court in that case and included in its opinion the following:

"We would impress upon trial courts and jury commissions the importance of full compliance with the jury laws that the rights of all accused under the Federal Constitution, as construed by the Supreme Court of the United States, shall be fully conserved. The act of August 27, 1935 (Gen-

eral Acts, 1935, page 713) was designed to give circuit judges more clearly defined power and discretion in having jury boxes refilled when found necessary or expedient in the administration of justice."

We submit that the above statement made by the Supreme Court of Alabama is indicative of the position not only of the judiciary, but of the administrative officials of the State of Alabama in regard to the jury question. Since the decision of this Honorable Court in the case of *Norris v. Alabama*, 294 U. S. 587, 79 L. Ed. 1074, we submit that the jury commissions of Alabama have tried to comply with the law as they understand it. Of course, the question as to whether or not they have complied is one of fact, depending on the condition in each county in Alabama, and the writers of this brief cannot say with definite certainty that in every county in Alabama that there is that number of negroes in the jury boxes which this Court would consider sufficient after passing on all of the facts which might be presented to this Court. This Court alone is the final arbiter in all such cases. The question is one of fact, and there are no facts in this case upon which this Court could determine the point sought to be raised.

Petitioner contends that the point was properly raised on the motion for a new trial because of the fact that Title 15, Sections 278 and 285, Code of Alabama, 1940, and Title 30, Section 46, Code of Alabama, 1940, prevented him from raising the ques-

tion by a motion to quash or a plea in abatement, and that said sections are violative of the Fourteenth Amendment. Said sections are hereafter set out:

"§ 278. Objections to indictments; how taken. —No objection to an indictment on any ground going to the formation of the grand jury which found the same can be taken to the indictment, except by plea in abatement to the indictment; and no objection can be taken to an indictment by plea in abatement except upon the ground that the grand jurors who found the indictment were not drawn by the officer designated by law to draw the same; and neither this objection, nor any other, can be taken to the formation of a special grand jury summoned by the direction of the court."

"§ 285. Objections to indictment for defect in grand jury; when not available; exceptions.—No objection can be taken to an indictment, by plea in abatement or otherwise, on the ground that any member of the grand jury was not legally qualified, or that the grand jurors were not legally drawn or summoned, or on any other ground going to the formation of the grand jury, except that the jurors were not drawn in the presence of the officers designated by law; and neither this objection nor any other can be taken to the formation of a special grand jury summoned by the direction of the court."

"§ 46. (8637) No objection except for fraud in drawing.—No objection can be taken to any venire of jurors except for fraud in drawing or summoning the jurors."

The contention of petitioner is specifically answered by the decision of the Supreme Court of Alabama in the cases of *Millhouse v. State*, supra, and *Vaughn v. State*, 235 Ala. 80, 177 So. 553, where it was held that a motion to quash the indictment is a proper method of raising this question.

In the case of *Norris v. Alabama*, supra, this Honorable Court recognized the fact that a motion to quash the indictment was a proper method of raising the exclusion question in Alabama.

It is true that this Court has decided that even though a constitutional question which has been sought to be invoked is denied on non-Federal grounds, it is the province of this Court to inquire whether the decision of the State court rests upon a fair or substantial basis. This Court will determine for itself whether or not the decision of the State court on a non-Federal ground was a real one, or whether it was set up as an evasion and merely to give color to a refusal to allow the Federal right.
Rogers v. Alabama, 192 U. S. 226.

Broad River Company v. South Carolina, 281 U. S. 539.

Respondent submits, however, that the action of the trial court in this case was not an attempt to evade a Federal question but was following the usual course of its judgments. The fact that the Supreme Court of Alabama had theretofore reversed the action of the trial court in the case of *Millhouse v. State*, supra, where a motion to quash was seasonably made is indicative of the fact that such court is not inclined to such evasive practices.

In the case of *Jacobi v. Alabama*, 187 U. S. 133, it appears that the State was allowed in the trial court to introduce evidence of the prosecuting witness which had been given on a former trial due to her absence from the state, which was in accordance with the established decisions of the courts of this State. The defendant objected and moved to exclude on the ground that "the defendant has the constitutional right to be confronted by the witness." Objection was overruled. No reference was made to the Constitution of the United States in the objection. When the case reached the Supreme Court for the first time error was assigned to the admission of the evidence as being in violation of the Fourteenth Amendment. The Supreme Court of Alabama did not refer to that contention because of the settled rule in Alabama in criminal cases that when specific grounds of objection to the admission of evidence are assigned, all others are waived. This Court refused to interfere with the action of the Supreme Court of Alabama in adhering to the usual course of its judgments.

To like effect is the decision of this Court in the case of *Herndon v. Georgia*, 295 U. S. 441, wherein it was held as follows:

> "It is true that there was a preliminary attack upon the indictment in the trial court on the ground, among others, that the statute was in violation 'of the Constitution of the United States' and that this contention was overruled. But, in addition to the insufficiency of the specification, the adverse action of the trial court was not preserved by exceptions pendente lite or assigned as error in due time in the bill of exceptions, as the settled rules of the state practice require. In that situation, the State Supreme Court declined to review any of the rulings of the trial court in respect of that and other preliminary issues; *and this determination of the State Court is conclusive here.*" (Italics ours.)

The opinion of this Court in the Herndon case, supra, does not disclose what were the preliminary attacks which were made upon the indictment. A consideration of the decision of the Supreme Court of Georgia, 178 Ga. 832, 174 S. E. 597, rehearing denied, 179 Ga. 597, 176 S. E. 620, shows, however, that before pleading to the merits, Herndon filed a motion to quash the indictment and also a plea in abatement alleging in each that he was a negro, and that members of his race were unlawfully, systematically, and intentionally excluded from the grand jury which indicted him, in direct violation of the

Fourteenth Amendment to the Constitution of the United States, and of Paragraph 3, Section 1, Article 1, of the Constitution of the State of Georgia. Issue was joined and the judge decided the matter without a jury. The trial judge denied both the motion to quash and the plea in abatement.

No exceptions *pendent lite* were filed to any of the rulings of the trial judge denying the motions to quash and the pleas in abatement. However, the action of the trial judge in denying and overruling such motions and pleas were assigned as error in the motion for a new trial. The Supreme Court of Georgia held that under the settled rules of practice applicable in that state, the rulings and findings of the trial judge upon the preliminary issues could not properly be asserted as grounds of the motion for a new trial relating to the main and final issue as made by the indictment and the plea of not guilty, but that the conclusions reached by the court on such preliminary or collateral issues should have been excepted to *pendent lite*, or assigned as error, in due time in the bill of exceptions.

Thus, the Supreme Court of Georgia refused to pass on the Federal question, but based its decision on the rule of practice and procedure long applicable in the courts of that state. Respondent, therefore, respectfully submits that the conclusion of this Honorable Court in the Herndon case, supra, to the effect that the "determination of the State court is conclusive here" is applicable to the present case. In

fact, respondent submits that the rule which was followed by the Supreme Court of Alabama in the instant case is more substantial and based more on logic and reasoning than is the rule which was followed by the Supreme Court of Georgia in the *Herndon* case.

John v. Paullin, 231 U. S. 583;

Atlantic Coast R. Co. v. Mims, 242 U. S. 532;

Brooks v. Missouri, 124 U. S. 394;

Erie Railway Co. v. Purdy, 185 U. S. 148.

In the case of *Tarrance v. Florida*, 188 U. S. 519, 525, this Court considered the action of the trial court of Escambia County, Florida, in striking defendant's motion to quash the indictment, on the ground that negroes had been systematically excluded from the grand and petit juries where a negro was the defendant. This Court refused to reverse the judgment of the Supreme Court of Florida on the ground that that court had considered no Federal question, but had applied to the action of the trial court a settled rule of practice in the State of Florida, which rule of practice was supported by many prior decisions to the effect that all objections to the competency of and to the regularity of selecting, drawing or impaneling of, grand or petit juries must be raised by plea in abatement instead of motion to quash.

In the instant case, the decision of the Supreme Court of Alabama is not based on the fact that petitioner was mistaken in the proper way of presenting to the court for its determination the question as to whether or not he had been denied his constitutional rights, but is based on the fact that although represented by competent counsel who had long been an active practitioner in the courts of the county and state, and who was a Circuit Solicitor for sixteen years in Alabama, no such question was presented until after verdict, judgment and sentence.

Decisions of the courts of last resort of the several states of the Union are, of course, not binding upon this Honorable Court. But respondent would like to call to the Court's attention the fact that there are many decisions of state courts which hold to the same conclusion as does the Supreme Court of Alabama; namely, that the question of the exclusion of members of a race or class from the grand jury or petit juries comes too late when not raised in accordance with the established rules of practice and procedure in the state. This fact is called to the Court's attention for the purpose of showing that the Supreme Court of Alabama did not act in an evasive manner when it refused to consider the Federal question, but based its conclusion on the law of practice and procedure in effect in Alabama.

The identical situation is presented in the case of *Hicks v. State*, 143 Ark. 158, 202 S. W. 308, cert. den. 254 U. S. 630. In the case of *Washington v. State*,

95 Fla. 289, 116 So. 470, the Supreme Court of Florida held that timely and appropriate procedure must be invoked in asserting race discrimination in forming jury panels, citing the case of *Tarrance v. Florida*, supra. In the Washington case, no motion to quash or plea in abatement was filed until after a conviction, when the defendant sought to raise the question of exclusion of negroes from the grand and petit juries by a writ of *coran nobis*, which the Supreme Court held could not be done. This Court denied certiorari, 278 U. S. 599.

Garnett v. State, 60 S. W. 765 (Tex.);

Watts v. State, 75 Tex. Crim. Rep. 330, 171 S. W. 202;

Kennard v. State, 61 S. W. 131 (Tex.);

Cooper v. State, 64 Md. 40, 20 Atl. 986;

People v. Duncan, 261 Ill. 339, 103 N. E. 1043;

State v. Walker, et. al., 189 La. 241, 179 So. 302.

The case of *United States v. Gale*, 109 U. S. 65, in answer to a challenge which had been made to the constitutionality of a Federal statute, this Court said:

"Inasmuch as, by pleading not guilty to the indictment, and going to trial without making any objection to the mode of selecting the grand jury, such objection was waived. The defendant should either have moved to quash the indictment or have pleaded in abatement, if they had no opportunity or did not see fit, to challenge the array. This, we think, is the true doctrine in cases where the objection does not go to the subversion of all the proceedings taken in impanelling and swearing the grand jury; but relates only to the qualification or disqualification of certain persons sworn upon the jury or excluded therefrom, or to mere irregularities in the constituting the panel."

Respondent respectfully submits that the Supreme Court of Alabama did not commit reversible error in holding that: "No question is presented for review as *** to the venire or selection of the jury by which appellant was tried," (Record 111-122) because the question was not presented in the manner pointed out hereinabove.

B.

PETITIONER WAS NOT DENIED DUE PROCESS OF LAW BY THE ADMISSION INTO EVIDENCE OF HIS CONFESSION

Petitioner contends that the judgment of the Supreme Court of Alabama should be reversed in that he was convicted upon the confession of guilt extorted from him by and through coercion, compulsion and putting him in fear by the officers of Limestone County, Alabama, acting in their official capacity, in violation of the due process clause of the fourteenth Amendment to the Constitution of the United States.

In the case of *Brown v. State of Mississippi*, 297 U. S. 278, 56 S. Ct. 461, 80 L. Ed. 682, on writ of certiorari to the Supreme Court of the State of Mississippi, in an opinion written by Mr. Chief Justice Hughes, it was held that the use of a confession obtained by coercion, brutality and violence as basis for conviction and sentence, constituted denial of due process under the Fourteenth Amendment of the Constitution of the United States.

The facts in that case are important. In the first place, the convictions rested solely upon confessions shown to have been extorted by officers of the State by brutality and violence. Aside from the confessions, there was no evidence sufficient to warrant the admission of the case to the jury. The confessions

were received over the objections of defendants' counsel. There was no dispute as to the facts with relation to the manner in which the confessions were obtained. These facts are briefly as follows:

As to the defendant Ellington, he, an ignorant Negro, was taken from his home by a number of white men including a deputy sheriff, who took him to the home of the deceased and accused him of the crime. Upon his denial they seized and hanged him by a rope to the limb of a tree, let him down then hanged him again, and when he was let down the second time, still protesting his innocence, he was tied to a tree and whipped. Still declining to confess, he was finally released and returned with some difficulty to his home. The evidence showed that the signs of the rope on his neck were still plainly visible at the time of trial. A day or two after the foregoing ordeal he was arrested and taken to the jail in an adjoining county. On the way to the jail the deputy in charge of him stopped and again severely whipped him and continued to whip him until the defendant agreed to confess. Upon reaching the jail he did confess.

The defendants Brown and Shields, also ignorant Negroes, were arrested and taken to the same jail, where the same deputy, accompanied by a number of white men, made them strip and they were laid over chairs and their backs cut to pieces with a leather strap with buckles on it, and they were informed that the whipping would be continued until they confessed in detail as demanded by those present. The

defendants did confess, and as the whippings progressed and were repeated, they changed or adjusted their confessions in all particulars of detail so as to conform to the demands of their torturers. There was other evidence of brutal treatment. It was said by the Court to read "more like pages torn from some medieval account than a record mode within the confines of a modern civilization which aspires to an enlightened constitutional government."

The confessions were obtained on April 1st, repeated on April 2, 1934. Defendants were indicted on April 4th and tried on April 5th and 6th. The evidence upon which the conviction was obtained was the so-called confessions. Without this evidence a peremptory instruction to find for the defendants would have been inescapable.

This Honorable Court stated that by the undisputed evidence the confessions had been obtained by the brutal methods above described, and said:

> "The trial court knew that there was no other evidence upon which conviction and sentence could be based. Yet it proceeded to permit conviction and to pronounce sentence. The conviction and sentence were void for want of the essential elements of due process, and the proceeding thus vitiated could be challenged in any appropriate manner."

It then ordered the judgment reversed.

In *Chambers v. State of Florida*, 60 S. Ct. 472, decided by this Honorable Court on February 12, 1940, in an opinion written by Mr. Justice Black, the "grave question" presented by the petition for certiorari being whether the proceedings in which confessions were utilized and which culminated in sentences of death upon four young Negroes in the State of Florida failed to afford a safeguard of that due process of law guaranteed by the Fourteenth Amendment of the Constitution of the United States, this Court first succinctly stated the rule governing this matter as follows:

> "However, use by a State of an improperly obtained confession may constitute a denial of due process of law as guaranteed in the Fourteenth Amendment."

The facts showed that an elderly white man was robbed and murdered. After discovery of this murder, from twenty-five to forty Negroes living in the community, including the defendants, were arrested. Some of the Negroes, including two of the defendants, were taken from jail to another county for incarceration. During the ride one of the guards stated in the hearing of defendants that they were being taken to escape a mob. Later these Negroes were returned to the original jail. It was clear from the evidence of both the State and the defendants that for a period from May 14th to May 20th these Negroes, including defendants, were subjected to questioning and cross-questioning. There was no time during the week in

which they were permitted to see or confer with counsel or a single friend or relative. The officers were in the jail almost continually during the week questioning the Negroes in connection with this case. The testimony was in conflict as to whether the defendants were continually threatened and physically mistreated until they confessed. However, according to the opinion of this Honorable Court, it was certain that by Saturday, May 20th, five days of continued questioning had elicited no confession. At about 3:30 o'clock on Saturday afternoon a "concentration of effort" was brought to bear upon a number of prisoners, including defendants, which resulted in continuous questioning through the night till sometime in the early hours of the following morning when one of the defendants "broke", whereupon the State's Attorney was awakened and brought to the jail, but after hearing the confession then obtained was dissatisfied with it. Consequently the questioning was continued, and just before sunrise confessions were obtained which were satisfactory to the State's attorney. One of the confessing defendants pleaded guilty. The Court said:

> "When Chambers was tried, his conviction rested upon his confession and testimony of the other three confessors. The convict guard and sheriff 'were in the Court room sitting down in a seat.' And from arrest until sentenced to death, petitioners were never—either in jail or in court—wholly removed from the constant observation, influence,

custody and control of those whose persistent pressure brought about the sunrise confessions."

In passing upon the issue of whether the proceedings afforded the safeguard guaranteed by the Fourteenth Amendment, this Court pointed out specifically that there were certain "undisputed" facts, certain "admitted practices" and certain matters "without conflict", and we direct the attention of this Honorable Court particularly to that circumstance as being important in consideration of the instant case. We quote from the opinion in *Chambers v. State of Florida*, as follows:

"Here the record develops a sharp conflict upon the issue of physical violence and mistreatment, but shows, without conflict, the drag net methods of arrest on suspicion without warrant, and the protracted questioning and cross questioning of these ignorant young colored tenant farmers by State officers and other white citizens, in a fourth floor jail room, where as prisoners they were without friends, advisers or counselors, and under circumstances calculated to break the strongest nerves and the stoutest resistance. Just as our decision in *Brown v. State of Mississippi* was based upon the fact that the confessions were the result of compulsion, so in the present case, the admitted practices were such as to justify the statement that 'the undisputed facts showed that compulsion was applied.' "

The case of *White v. State of Texas*, 310 U. S. 530, 84 L. Ed. 1342, is cited by petitioner.

The facts in this case are that defendant, an illiterate farm hand (apparently a Negro) was held in jail for several days without charges being filed against him. He was without legal counsel and out of touch with friends or relatives; on several nights during this period he was taken handcuffed by armed guards out of the jail and into the woods for interrogation; while in jail the sheriff put defendant by himself and kept constantly watching and talking to him; a confession was obtained after this process by an interrogation of the county attorney from 11:00 p. m. to 3:30 a. m., during which period the officers who had been to the woods were in and out of the room. The defendant claimed that while out in the woods he was whipped and a confession was demanded of him and that he was warned not to tell that he had been out in the woods. This statement of the defendant was controverted by the oficers who, however, did not controvert the other matters above referred to. The state's case against the defendant rested substantially upon the confession thus obtained.

This Honorable Court cited and quoted from the case of *Chambers v. State of Florida*, supra.

Certain obvious distinctions between the facts in the case of *White v. Texas*, and those in the instant case are obvious. The petitioner in this case is not

an illiterate farm hand, but, on the contrary, the owner of a barber business, whose language as shown by his confession and by his testimony was responsive, lucid and intelligent. Nothing happened to him comparable to the systematic taking of the defendant out into the woods in the middle of the night as testified in the *White* case, nor was he, as in that case, deprived of counsel. Moreover, when he did confess he did so as a result of a voluntary determination on his own part.

The foregoing are three of the decisions of this learned Court which apply and establish a rule which we believe may be stated, as indicated by those cases, as follows:

Where a conviction rests solely or principally upon a confession or confessions, and where it appears without conflict that such confession or confessions were obtained by any means amounting to compulsion, the rights of the individual convicted by the use of such confession or confessions, under the due process clause of the Fourteenth Amendment of the Constitution of the United States, have been violated and this Court will, in an appropriate proceeding brought for that purpose, set aside such conviction and any judgment resulting therefrom.

The foregoing statement includes, as we construe the authorities, the following elements:

(1) The confession must have been obtained by compulsion.

(2) The fact of such compulsion must be shown by undisputed or uncontradicted evidence.

(3) The confession must be the sole or at least a principal part of the evidence upon which the conviction rests.

Stating the rule conversely, if our analysis of those decisions is correct, this Honorable Court will not interfere with the judgment of conviction where the confession is procured under such circumstances that it is not clear that it was obtained by compulsion, or where there is a conflict on that question as a result of which conflict the trial court in the first instance would be justified in holding either that there was or was not compulsion, or where it appears that the conviction of the accused is supported by substantial evidence independent of the confession.

Our conclusion, with reference to the matter of the rule where a conflict in the evidence appears, is supported by several decisions to which we direct the attention of this Honorable Court. Preliminarily, it may be said that the three cases heretofore cited appear to recognize the rule to be that where there is a conflict of vidence as to whether the confession is or is not voluntary, and the trial court determines that it is voluntary, the decision of the trial court on all

points as to which there is a conflict will not be disturbed by an Appellate Court. This is suggested by the stress that is laid in those three cases in pointing out that the evidence was "without conflict" or "undisputed" or "conclusive" or "admitted."

Petitioner in this case was not held incommunicado. There is not one line of testimony in the record that shows that petitioner was denied the right to see counsel or any and all members of his family. According to the testimony of petitioner's father he saw petitioner in jail in Birmingham, Alabama where petitioner told him the place to look for his gun which was thrown from the train three or four miles from Athens, while he was riding the freight train. (Record 62).

According to petitioner's testimony (Record 70) he was arrested in Nashville, Tennessee, on Tuesday night following the shooting on Sunday morning, March 23, 1941, and was carried to Tuscumbia, Alabama, arriving around twelve o'clock of the same night; stayed in jail in Tuscumbia until 2 p. m. the next day and was removed to Birmingham, Alabama, where he remained until the following Monday. He was then transferred to the jail in Decatur, Alabama, but was removed from Decatur to the jail in Athens, Limestone County, Alabama, three weeks before his arraignment on May 19, 1941, upon the indictment charging him with the murder of Bedford Brackeen, and remained in jail in Athens until the day of his trial (Record 70). Therefore, petitioner was in jail

seven weeks in his home town before his trial got under way and where his family and friends resided and could see him every day.

There is not one line of testimony in the record that the conviction of petitioner was based upon a confession of guilt extorted from him by coercion, compulsion or by putting him in fear by the officers of the City of Athens and the State of Alabama while acting in their official capacities. Petitioner's testimony itself, which is entirely silent as to any threats, mistreatment, intimidation, inducements or coercive methods, is a full and complete answer to petitioner's claim for a writ of certiorari, and his brief in support thereof, to the fact that his conviction for murder and sentence to death was based upon a confession wrung or extorted from him by coercion, compulsion, fear, threats, physical violence or by any other means.

This Court has not hesitated to set aside convictions based in whole, or in substantial part, upon confessions extorted by the methods herein claimed by petitioner. The confessions in such convictions were secured by protracted and repeated questioning of ignorant and untutored persons in whose minds the power of officers was greatly magnified; who sensed the adverse sentiments of the community and the danger of mob violence; who had been held incommunicado, without the advice of friends or of counsel, some of whom had been taken by officers at night from jail into dark and lonely places for questioning.

Chambers v. Florida, 309 U. S. 227, 84 L. Ed. 716, 60 S. Ct. 472;

White v. Texas, 310 U. S. 530, 84 L. Ed. 1342, 60 S. Ct. 1032;

Lomax v. Texas, 313 U. S. 544, 85 L. Ed. 1511, 61 S. Ct. 956.

The present case is outside the scope of the above and similar decisions. This petitioner was never taken from jail for questioning. He was not denied the advice of friends or of counsel. He was not ignorant and untutored. The power of officers was not greatly magnified in his mind. He was never in danger of mob violence, even though there was great interest manifested in the trial of the case by the presence of a full courtroom. The sentiment of the community was not adverse to him as shown by the fact that some twelve or more of the leading citiens of Athens and Limestone County, including the Sheriff of said county, took the witness stand to testify as to his good character and his reputation for being quiet and peaceful.

The State submits that the words of Mr. Justice Cardozo in the case of *Snyder v. Massachusetts*, 291 U. S. 97, are applicable to the attempt on the part of petitioner to apply the rule laid down in the cases of *Brown v. Mississippi*, supra, *White v. Texas*, supra, and *Chambers v. Florida*, supra, to the facts in this case.

In Snyder v. Massachusetts, supra, this Court said:

> "A fertile source of perversion in constitutional theory is the tyranny of labels. Out of the vague precepts of the 14th Amendment a court frames a rule which is general in form, though it has been wrought under the pressure of particular situations. Forthwith another situation is placed under the rule because it is fitted to the words, though related faintly, if at all, to the reasons that brought the rule into existence."

It is settled law, both in the State of Alabama and in this Court, that it is the duty of the trial court to determine whether the admission or confession of a defendant is voluntary, and only an abuse of that discretion will justify a reversal by the reviewing court.

Hopt v. Utah, 110 U. S. 574, 583;

Bram v. United States, 168 U. S. 532, 549;

Travers v. United States, 6 App. D. C. 450, 459;

Pearlman v. United States, 10 Fed. (2d) 460;

Allen v. State, 298 S. W. 993; 175 Ark. 264;

Harrison v. State, 110 Fla. 420, 148 So. 882;

State v. Andreason, 44 Idaho 396, 257 P. 370;

People v. Albers, 360 Ill. 73, 195 N. E. 459;

Mack v. State, 203 Ind. 355, 180 N. E. 279;

Buckler v. State, 171 Miss. 353, 157 So. 353;

State v. Yeager, 12 S. W. (2d) 30, (Mo.);

State v. Dixson, 80 Mont. 181, 260 P. 138;

State v. Yarrow, 104 N. J. Law 512, 141 A. 85;

People v. Bartato, 254 N. Y. 170, 172 N. E. 458;

State v. Green, 128 Ore. 49, 273 P. 381;

Commonwealth v. Dilsworth, 289 Pa. 498, 137 A. 683;

State v. Peden, 154 S. E. 658, 157 S. C. 459;

State v. Richards, 101 W. Va. 136, 132 S. E. 375;

Sweda v. State, 206 Wis. 617, 240 N. W. 369.

The rule is best expressed by Mr. Justice Harlan, who delivered the opinion of the court in *Hopt v. Utah*, supra, that:

"The admissibility of such evidence (of a confession) so largely depends upon the special circumstances connected with the confession that it is difficult, if not impossible, to formulate *a rule that will comprehend all cases.* As the question is necessarily addressed, in the first instance, to the judge, and since his discretion must be controlled by all the attendant circumstances, the courts have wisely forborne to mark with absolute precision the limits of admission and exclusion." (Italics supplied).

And as said by Mr. Justice White in *Bram v. United States,* supra:

" *** all the decided cases necessarily rest upon the state of facts which existed in the particular case, and, therefore, furnish no certain criterion, since the conclusion that a given state of facts was adequate to have produced an involuntary confession does not establish that the same result has been created by a different although somewhat similar condition of fact."

It is to be seen, therefore, that in the instant case a determination of the question presented must necessarily devolve upon the facts which were before the trial court at the time of the admission of the confession.

In Alabama, as well as in the other states, the exclusion from the jury of a confession rests on its con-

nection with the inducement. If promises or threats do not have the influence to induce the confession, the confession must be referred to other motives. As held in *Beckman v. State*, 100 Ala. 15, 14 So. 859: (Quoting from syllabus)

> "The exclusion from the jury of a confession rests on its connection with the inducement; they stand to each other in the relation of cause and effect, and if it is apparent that no such connection exists, there is no reason for the exclusion of the evidence."

This is uniformly the rule throughout the United States.

See *Osborn v. People*, 83 Colo. 4, 262 P. 892, 904;

State v. Grover, 96 Me. 363, 52 A. 757;

Cady v. State, 44 Miss. 332;

Spears v. State, 2 Ohio St. 583;

State v. Hopkirk, 84 Mo. 278.

C.

VERDICT OF THE JURY WRITTEN WITH A RED PENCIL DOES NOT SHOW DENIAL OF DUE PROCESS OF LAW OR THAT DEFENDANT WAS TRIED BY A BIASED OR PREJUDICED JURY

Petitioner's contention in his specification of Error No. two that he was denied due process in that the verdict of the jury was written in a red-colored pencil is so obviously unsound and without merit that respondent in reply thereto merely refers this court to the testimony of Mr. Fletcher Owens on the motion for a new trial. (Record 100.) Mr. Owens testified:

Direct Examination

"I am the man who wrote the verdict in the case of Robetr Redus. I wrote it with a red pencil. It was mine. I was working in the Triple A Program, checking cotton. It was my duty to draw plats and diagrams. Checking off land on the map and drawing off land lines. I use a red pencil in my work. I had been using it for six years. I use it now. I have it in my possession now. I am working on the same job."

Cross Examination

"This is the pencil I used to write that verdict. It was issued to me about the 16th of June, I be-

lieve. Just about a week before the trial. I have other pencils with me now. But I had no other pencil with me that night. I had lost my black pencil and hadn't had one re-issued to me. No one else had a pencil. They asked who had a pencil and I said I had one *** ."

D.

THERE WAS NO DENIAL OF ANY CONSTITUTIONAL RIGHT TO PETITIONER BY THE ACTION OF THE TRIAL COURT IN ALLOWING THE SOLICITOR OVER THE OBJECTION OF THE DEFENDANT IN FIRST DEGREE MURDER PROSECUTION TO QUESTION THE JURY ON THE VOIR DIRE AS TO WHETHER ANY OF THE JURORS HAD A RELIGIOUS BELIEF THAT CAPITAL PUNISHMENT WAS CONTRARY TO THE TEACHINGS OF THE BIBLE

U. S. v. Miles, 1876, 2 Utah (Reversed on other grounds 1881), 103 U. S. 304, 26 L. Ed. 481;

Reynolds v. U. S., 98 U. S. 145 (1879) 25 L. Ed. 244;

Logan v. U. S., 1891, 144 U. S. 263, 298;

Young v. State, 1928, 41 Okla. Criminal Reports 226, 271 Pac. 426, Ala. Code of 1940, Tit. 30, Sec. 57;

Untreiner v. State, 146 Ala. 26, 41 So. 285;

Sanford v. State, 143 Ala. 78, 39 So. 370;

Rose v. Magro, 220 Ala. 120, 124 So. 296.

The petitioner in his petition for writ of certiorari raises the point that he has been denied his fredom of religion as guaranteed by the United States Constitution in that the jurors who are empanelled to try his case were questioned by the solicitor as to whether they believed in capital punishment and as to whether they (jurors) interpreted the Bible as prohibiting capital punishment. *Alabama Code of* 1940, Title 30, Section 57 provides:

> "§ 57. Additional ground of challenge in certain cases in favor of state.—On the trial for any offense which may be punished capitally, or by imprisonment in the penitentiary, it is a good cause of challenge by the state that the person has a fixed opinion against capital or penitentiary punishments, or thinks that a conviction should not be had on circumstantial evidence; which cause of challenge may be proved by the oath of the person, or by other evidence."

In the case of *Miles v. U. S.*, supra, which was a prosecution for bigamy, the defendant being a Mormon, a juror was questioned and examined as to whether he believed that plural marriage or polygamy was in accordance with the teaching of his religion. In an opinion by the Supreme Court of Utah, it was said:

"A religious belief takes strong hold upon the individual. If a person believes it is his religious duty or privilege to do an act, he would not, as a consequence, look upon such act as criminal. Looking upon such act as innocent, he would naturally, but perhaps unconsciously be averse to inflicting punishment therefor. *** In such a case he would naturally lean toward an acquittal, and would possess that state of mind which would lead to a just inference that he would not act with entire impartiality in the case."

Mr. Justice Woods speaking for the United States Supreme Court said:

"Whether or not that bias was founded on the religious belief of the juror, is entriely immaterial, if the bias existed. It has been held by this court, that on an indictment for bigamy it was no defense that the doctrines and practice of polygamy were a part of the religion of the accused. *Reynolds v. U. S.*, supra.

"It could not, therefore, be an invasion of the constitutional or other rights of the juror, called to try a party charged with bigamy, to inquire whether he himself was living in polygamy, and whether he believed it to be in accordance with the divine will and command.

"If the jurors themselves had no ground of complaint it is clear the defendant had none." *U. S. v. Miles* supra.

If there is any doubt remaining in the Court's mind as to whether defendant was denied his constitutional right in that the jury was qualified as to their beliefs in capital punishment, the language of Justice Gray in *Logan v. U. S.* should be conclusive:

"As the defendants were indicted and to be tried for a crime punishable with death, those jurors who stated on voir dire that they had 'conscientious scruples in regard to the infliction of the death penalty for crime' were rightly permitted to be challenged by the government for cause. A juror who has conscientious scruples on any subject, which prevent him from standing indifferent between the government and the accused, and from trying the case according to the law and the evidence, it is not an impartial juror. This court has accordingly held that a person who has a conscientious belief that polygamy is rightful may be challenged for cause on a trial for polygamy. Reynolds v. United States, 98 U. S., 145, 147, 157; Miles v. United States, 103 U. S. 304, 310. And the principle has been applied to the very question now before us by Mr. Justice Story in United States v. Cornell, 2 Mason, 91, 105, and by Mr. Justice Baldwin, 78, 83, as well as by the courts of every State in which the question has arisen,

and by express statute in many States. Whart. Crim. Pl. (9th ed.) §664."

In the case of *Young v. State*, supra, the defendant objected to the State's qualifying the jury as to church membership. This qualification by the State was held to be valid by the Criminal Court of Appeals of Oklahoma. The Court stating:

"Objection is also made that the court permitted counsel for the state in examining the jury to inquire if they were members of any church or if they had been members of any church. It is true that church membership does not determine the qualifications of a juror, but a prospective juror, within reasonable bounds and limited by a fair discretion of the court, may be examined as to his membership in any organization which might give counsel information and enable him to properly exercise his peremptory challenges."

Likewise the Alabama Court has held that the voir idre examination of jurors as to qualification and the extent thereof is largely in the court's discretion. *Rose v. Magro*, 220 Ala. 120, 124 So. 296.

CONCLUSION

In conclusion, we respectfully submit that an analysis of the record demonstrates that no doubt of petitioner's guilt is shown to exist; all questions as

to the deprivation of his constitutional rights rest entirely on his unsupported word and are wholly dissipated by a fair examination and consideration of all the evidence; no spirit of racial prejudice or mob domination is presented; he was given ample time for preparation and trial; he was ably represented by eminent counsel of his own choosing; and a case which, because of its very nature (provoked by an incident of no material consequence), might have been ultra-spectacular, was tried in a calm and dispassionate manner.

For the reasons hereinabove set forth, we base our contention that this petition for writ of certiorari should be denied, or, in the alternative, we respectfully suggest that the judgment of the Supreme Court of Alabama be affirmed.

Respectfully submitted,

WILLIAM N. McQUEEN,

Acting Attorney General,
Counsel for Respondent.

JOHN O. HARRIS,

Assistant Attorney General,
On the Brief.

CERTIFICATE OF SERVICE

I hereby certify that I have forwarded copy of the foregoing Brief to Hon. Walter S. Smith, Attorney for Petitioner, on this the 27th day of February, 1943.

WILLIAM N. McQUEEN,
Acting Attorney General,
Counsel for Respondent.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

NO. 704

ROBERT REDUS, ALIAS ROBERT REEDUS,
Petitioner,

v.

STATE OF ALABAMA,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR REHEARING OF THE PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

BRIEF FOR RESPONDENT

WILLIAM N. McQUEEN,
Acting Attorney General
Counsel for Respondent.

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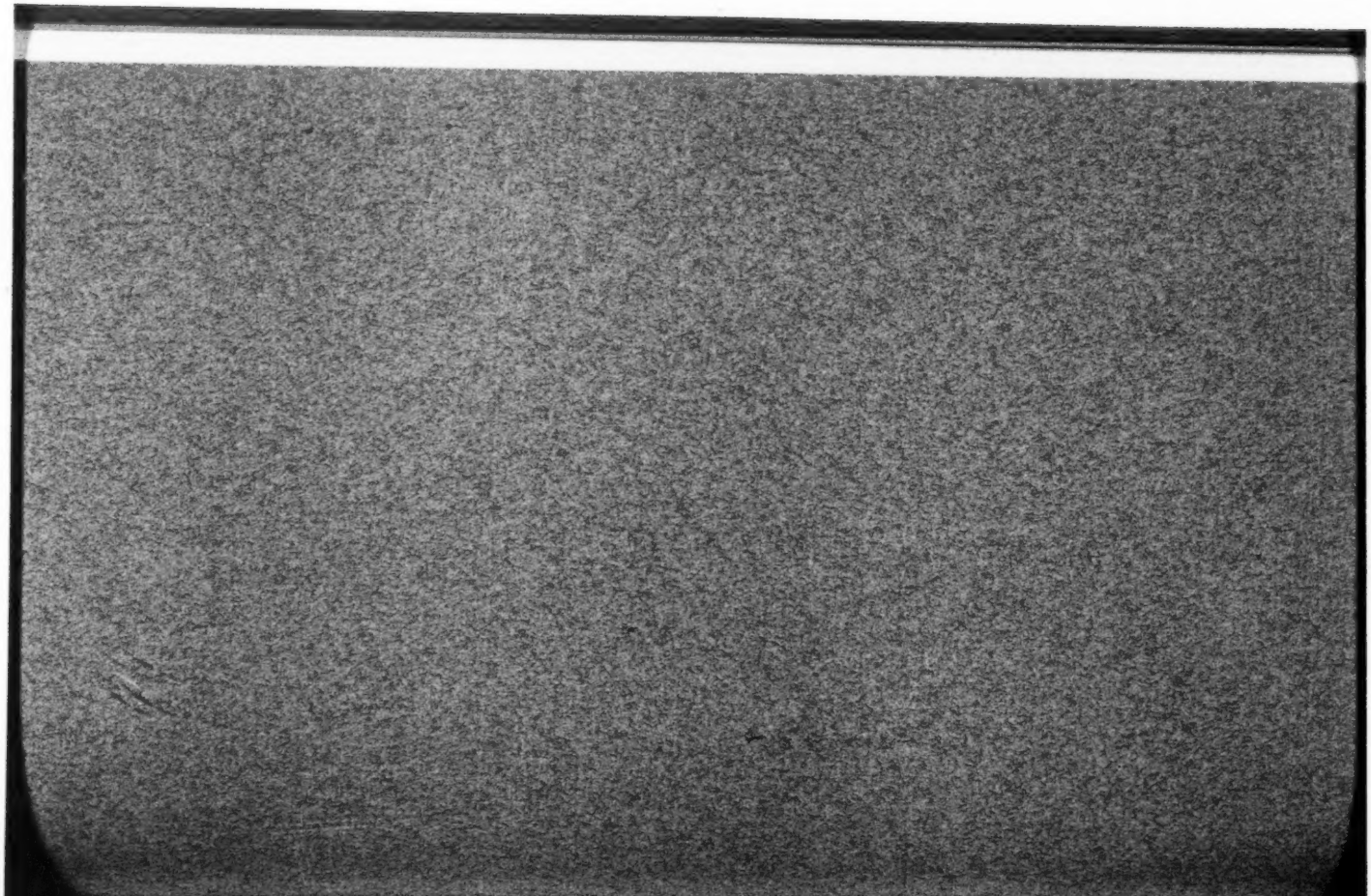

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BRIEF FOR RESPONDENT

Petitioner has filed a rather lengthy brief in support of his petition for rehearing which fails to meet the issues sought to be raised by his original petition, and overlooks or misstates facts disclosed by the record. He does not raise or present to this Honorable Court any question that was not raised

or presented in his original petition for writ of certiorari, which said petition this Court denied on March 9, 1943. Petitioner charges respondent with certain admissions and statements in respondent's original brief in this case which respondent did not make, as will be hereinafter demonstrated.

THE FACTUAL MISSTATEMENTS BY PETITIONER

MISSTATEMENT NO. 1

Petitioner in his brief in support of petition for rehearing (page 7) says: "The undisputed evidence offered by petitioner and by his witnesses, who had seen his pistol, was to the effect that it was an Iver Johnson or Owl Head pistol of cheap make, *and the evidence of both Dr. Rehling, who exhumed the body, and of Mr. Henry D. Jones, attorney for the petitioner in the trial court, was to the effect that petitioner's pistol would not carry a .32 long cartridge but that it would carry a .32 short.*" (Emphasis supplied.)

Dr. Rehling did not testify that the Iver Johnson gun introduced in evidence, allegedly belonging to petitioner, was petitioner's gun, nor that the Iver Johnson gun did not fire the balls removed from the body of Bedford Brackeen. Respondent calls the Court's attention to Dr. Rehling's testimony on re-direct and re-cross examination on Record page 53 and pages 55 and 56.

"RE-DIRECT EXAMINATION

"The weight of a .32-long and a .32-short can be the same depending on the people that manufacture it. I know the weight or size of this bullet, I weighed it and measured it. The

weight of those bullets removed from this body corresponds to that weight as commonly used in .32-long ammunition. The pistol shown me (indicating) is a .32-caliber. I don't know whether thats the pistol those bullets were shot from or not.

"RE-CROSS EXAMINATION

"The cartridges won't go in there. And the balls I took out of the body was shot out of a gun that had the makings of a better gun than that, a Smith & Wesson. Witness was handed the gun and he examins (sic) it. He says, that barrel is in such foul shape I can't tell, there are cobwebs in the cylinders. Wit. was asked this question: Could those balls have been shot by that gun. The Solicitor objected because it was not shown that this was the same pistol. The Court overruled the objection. Wit. stated: I would like to make an examination of that gun. Here the witness took the gun in the other room and examined it."

* * * * * * * * * * *

"RE-DIRECT EXAMINATION

"I have examined that gun. The riflings in the gun is 5 lands and 5 grooves, which is a Smith & Wesson rifling. The bullet I have here (indicating) this particular ball of that make

with adaptable powder it is used in 32-shorts in some instances.

"RE-CROSS EXAMINATION

"I said the bullet would correspond in weight to a .32-long. Defendant's attorney asked witness the following ques: Didn't you say it was a .32-long? The Solicitor objected to this question. The Court sustained the objection and the defendant reserved an exception. I stated it was the same weight as a .32-long. I know a long from a short. You can't tell from looking at it whether its a long or a short. I'll tell you what is used in a .32-long. By the Court: 'Dr. Rehling, what you recovered from this body upon which you performed an autopsy was the ball from the cartridge, is that right'? Wit. ans. 'Yes sir.' By the Court: 'The only method by which you can determine the caliber is determined by its weight.' The witness answered: 'The caliber is determined by measuring the diameter of the ball. The ball that I removed from the body when I made the examination, this one weighed 80.7 grams, and the one from the pleural cavity weighed 96.0. There is no definite way I can tell from the weight whether or not the ball was from a long or short cartridge other than knowing that balls of a given weight are usually used in a certain size and weight. You would have to see the shell of the cartridge to tell whether it was long or short.

I have examined balls of that nature of that weight which came from a .32-short cartridge. There is no way I can as an expert witness state definitely whether or not these balls introduced in evidence were from a .32-long or .32-short."

It is plainly seen from the above-quoted testimony of the ballistic expert that the Iver Johnson gun introduced in evidence *could* have fired the balls removed from the body of the deceased officer. However, we are willing to rest upon the statement in our original brief that, in our judgment, the Iver Johnson gun was a "planted gun", for the reason that the petitioner told the Sheriff of Limestone County, Alabama, that he threw the gun he used during the shooting from a fast-moving freight train just before he got to Nashville, Tennessee. (Record 78).

MISSTATEMENT NO. II

Petitioner says: "On the following morning Bialiff Biles, who had purportedly procured a confession of guilt from the petitioner at Columbia, Tennessee, while he was being brought back to Alabama, and who had testified against petitioner, and had done everything in his power to convict petitioner and send him to the electric chair, paraded the jury up and down the streets of the city of Athens, Alabama, among a crowd of spectators hostile to petitioner, and finally conducted the jury to the jury-room in the courthouse, where soon thereafter a verdict of guilty of murder in the first degree, with

infliction of the death penalty, was returned against petitioner by the jury, and petitioner respectfully submits that he was rushed to conviction by a jury which was swept to the fatal end by an irresistible wave of public passion against petitioner who allegedly had slain a police officer of the city of Athens, Alabama." (Petitioner's Br. page 11).

This statement is something more than a figment of imagination. It is an outright misstatement of facts. There is not one line of testimony in the record to support petitioner's statement that the bailiff paraded the jury up and down the streets of the city of Athens, among, or in the presence of, a crowd of spectators hostile to petitioner. The record facts in this case show conclusively that petitioner was not "rushed to conviction by a jury which was swept to the fatal end by an irresistable wave of public passion against petitioner." The crime was committed on March 23, 1941. Petitioner was arrested on March 25, 1941, and remained in jail until May 19, 1941, when he was removed from jail and arraigned in open court upon the indictment charging him with the murder of Bedford Brackeen. His trial was set for June 23, 1941. This conclusively shows that three months elapsed from the date of the crime until the trial got under way. These facts alone should put at rest any question that defendant was rushed to conviction by a wave of public passion. Without further comment upon the question of the activities of the bailiff respondent refers this Honorable Court to the testimony of said bailiff. (Record 101 and 102.)

ARGUMENT

THE JURY QUESTION

Petitioner says: "The jury that convicted petitioner was composed wholly of white jurors and out of the list of seventy-five jurors who were drawn to try the case the names of only two negroes appeared on the jury list, although the undisputed evidence on a motion for a new trial, showed that fully ten per cent of the men of Limestone County, Alabama, who were qualified for jury service, were members of the Negro race, but only two Negro jurors were drawn on the venire to try petitioner and the names of these two jurors were promptly stricken by the Solicitor, who represented the State of Alabama in the trial of the case in the trial court". (Petitioner's Br. page 11).

As pointed out in respondent's original brief the constitutional guaranty is not that a negro is entitled to have a member of his race on the grand jury which returned the indictment or on the petit jury which tries him but is that he is entitled to have members of his race who are otherwise qualified to be on the jury rolls and in the jury boxes from which such jurors are drawn.

The question of whether or not negroes are systematically and intentionally excluded from the

grand and petit juries because of race in any county in any state of the Union is one of fact. There are no facts in this case upon which this Court could possibly determine the exclusion question. From aught that appears from the record the two negroes drawn on the venire to try petitioner represented ten per cent of the negro men residing in Limestone County, Alabama, who were qualified for jury service.

ACCUSATORY STATEMENT BY COUNSEL FOR PETITIONER.

Petitioner charges as follows:

"The Acting Attorney General of Alabama admits that the above and foregoing statute is not complied with in certain counties in Alabama, but in face of the fact that only two negroes were draw on a venire composed of 75 jurors in the case at bar, but Limestone County, according to the Acting Attorney General, is not one of the erring and sinning Alabama counties that has violated the Fourteenth Amendment and the foregoing Federal statute by intentionally, systematically, and wrongfully excluding members of the negro race from serving on the grand and petit juries of said county, solely on account of race and color, contrary to the Fourteenth Amendment and to the above cited Federal statute." (Petitioner's Br. p. 12).

There is no earthly excuse for counsel representing petitioner making the above statement, charge or accusation. The statement is as pernicious and mean as it is false. It calls for condemnation in the strongest terms that can be employed for that purpose.

In answer to this statement, charge or accusation respondent begs to refer This Honorable Court to page 28 of its original brief, wherein respondent said:

> "We submit that the above statement made by the Supreme Court of Alabama is indicative of the position not only of the judiciary, but of the administrative officials of the State of Alabama in regard to the jury question. Since the decision of this Honorable Court in the case of *Norris v. Alabama*, 294 U. S. 587, 79 L. Ed. 1074, we submit that the jury commissions of Alabama have tried to comply with the law as they understand it. Of course, the question as to whether or not they have complied is one of fact, depending on the condition in each county in Alabama, and the writers of this brief cannot say with definite certainty that in every county in Alabama that there is that number of negroes in the jury boxes which the Court would consider sufficient after passing on all of the facts which might be presented to this Court. This Court alone is the final arbiter in all such cases. The question is one of fact, and there are no

facts in this case upon which this Court could determine the point sought to be raised."

CONCLUSION

For the reasons hereinabove set forth, together with the reasons set forth in our original brief, to which reference is hereby made, we base our contention that this petition for rehearing of the petition for writ of certiorari should be denied.

Respectfully submitted,

WILLIAM N. McQUEEN,

Acting Attorney General
Counsel for Respondent.

JOHN O. HARRIS,

Assistant Attorney General
On the Brief.

CERTIFICATE OF SERVICE

I hereby certify that I have forwarded copy of the foregoing Brief to Hon. Walter S. Smith, Attorney for Petitioner, on this the 1st day of April, 1943.

WILLIAM N. McQUEEN,
Acting Attorney General
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